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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1932

No. 541.

David Burnet, Commissioner of Internal Revenue,

Petitioner,

vs.

A. T. Jergins Trust,

Respondent.

PETITION FOR REHEARING.

MOTION TO STAY MANDATE.

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PETITION FOR REHEARING.

Comes now A. T. Jergins Trust by its attorneys, A. Calder Mackay and Marc F. Mitchell, and presents this its petition for a rehearing of the above entitled cause (judgment having been entered on March 13, 1933) under Rule 33 of the Revised Rules of the Supreme Court of the United States, and in support thereof respectfully urges:

THAT THE OPINION OF THIS HONORABLE COURT UNJUSTLY DISCRIMINATES AGAINST THE SOVEREIGNTY OF THE STATE OF CALIFORNIA AND IS A DEPARTURE FROM THE FUNDAMENTAL LAW OF THE LAND.

"That by clear implication the means employed by the general government to carry into operation the powers

granted to it are exempt from taxation by the states, as are those employed by the states exempt from taxation by the general government." This we understand to be the principle upon which the case stands or falls. As the Court has said it is "settled by a wealth of authority". We are unable to see, however, that the "considerations which have led to the condemnation of taxes in other circumstances are here absent". We understand from what the Court has said that instrumentalities or "means employed" by the states "to carry into operation the powers granted to it are exempt from taxation". We also understand that the State of California through its agency, the City of Long Beach, has the power to own land and having such power, has the further power to select its methods, means and instrumentalities of developing its lands and that this is what it did in the present case. We understand from the facts of the case that the "means employed" by it "to carry into operation the powers" which it thus had was a lease to the Jergins Trust. True "the levy is not upon the property of the municipality, nor upon the income it derives from its property, is not upon the city's share of the oil recovered, the lease, or the gross income therefrom". It is just as true that in the cases of *Gillespie v. State of Oklahoma,* 257 U. S. 501, and *Burnet v. Coronado Oil & Gas. Co.,* 285 U. S. 393, 76 L. Ed. 815, the levy was not upon the property of the government or the state nor upon the income they derived from their property, was not upon the government's or state's share of the oil recovered, the leases, or the gross income therefrom. Thus far, therefore, the three cases are identical and the principle fits all three. In this case the Court goes

further and finds "The law measures the assessment by the net income of the respondent". So did the law in the Gillespie case and so did the law in the Coronado case measure the assessment by the net income of the Gillespie and Coronado companies, respectively, and so were their operations "carried on in a private and not a public capacity for the personal gain" of the two companies. So far we are still precisely on the same footing as those cases. The only distinction pointed out by the Court between this case and the Gillespie and Coronado cases is that "In both of those cases the sovereign was acting as a trustee of an express trust with regard to the land leased". The Court did not define the character of the trust in which the City of Long Beach was acting as trustee, but the inference is that it is implied rather than expressed, or that it is general rather than specific. In other words, the trusts in the Gillespie and Coronado cases both devoted the income to a direct and specific purpose; in the Gillespie case, to the Indians as provided by treaty and in the Coronado case, to state schools as provided by law. In the case at bar the income is devoted by law to general governmental purposes. It is, we believe, the only distinction which can be made between the Gillespie and Coronado cases and this case. The distinction then seems to be that if the state's share of income from an oil lease is devoted to one governmental purpose, a tax upon the leased share in the hands of the lessee is "more definite and direct" and therefore void, but if the state's or city's share of the income from the oil lease is devoted to several governmental purposes according to law it is not so "definite and direct", and is "so remote from any governmental function as to render

the effect of the exaction inconsiderable as respects the activities of the city". We had generally supposed, and urge this thought upon the Court for reconsideration, that if more than one governmental activity were likely to be burdened by the imposition of a tax this fact would make the tax more objectionable than if it burdened only one governmental activity. But the principle here contended for, we submit, has never heretofore been confined to express trusts.

The City of Long Beach, having received delegated authority to own and use land, had an *express public* function to perform. Human language could not more clearly confer an "express trust" than the written delegation of power conferred by the state upon the City of Long Beach.

As we understand this Honorable Court's opinion in the case of *Gillespie v. State of Oklahoma,* 257 U. S. 501, the exemption from taxation was determined on "general principles". Furthermore, the question of the remoteness of the tax was specifically answered in the Court's opinion in which it is stated at page 505:

> "* * * That such leases were not taxable, went on *general principles,* * * *. The criterion of interference by the states with interstate commerce is one of degree. * * * The rule as to instrumentalities of the United States, on the other hand, is *absolute in form and at least stricter in substance.* * * * 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' * * * The step from this to the invalidity of the tax upon income from the leases is not long. * * *." (Italics ours.)

At page 506:

> "* * * The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases; * * *."

The only interference with a governmental agency which exists in a number of cases where the tax has been held void is that the burden of the tax indirectly comes from the government by reason of the fact that its (the government's) activities cost more if the tax is levied and paid by the governmental agency operating in a private capacity. It seems to be the only interference which takes place when a state attempts to tax the interest on United States Government bonds in the hands of private parties, or when the United States attempts to tax the interest upon state bonds in the hands of private parties. Here, however, as in the Gillespie and Coronado cases, the admission of the power to levy the tax admits the power to perform a series of other acts which would be so serious in their nature as to directly interfere with the control and management of the city's property and prevent it from exercising its independent judgment in the development of its property held by it in trust for the public use and in the management of its fiscal affairs. We refer to the power of sale which is a necessary incident to the power to tax. If the government may tax the income of the Jergins Trust it may sell its leasehold estate in the city land for the tax. It may then by the incidental power pass the estate to any other agency which might purchase it and compel the city to accept as its agency an agency wholly unsatisfactory to it and force it to deal with agencies involuntarily and

regardless of its wishes in the matter. This character of interference, we submit, is more serious and more to be avoided than the merely pecuniary one of causing, by a tax, the city or state to pay a higher royalty or interest rate.

We sincerely urge that the decision of this Honorable Court is discriminatory and works a grave injustice upon the city as well as upon the sovereign State of California. Long Beach, in the utilization of its lands held for public purposes, should be as free from tax as the State of Oklahoma is in the utilization of its lands. An implied governmental function should be clothed with as much sanctity as an express governmental function. The ownership and use by the City of Long Beach of its lands were permitted by written delegated authority which amounts to an "express trust".

In view of the foregoing and in view of the great importance of this question, it is respectfully prayed that this petition for rehearing be granted and that Taxpayer be given an opportunity for further argument.

Respectfully submitted,

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Certificate of Counsel.

I, A. Calder Mackay, counsel for the above named A. T. Jergins Trust, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

A. CALDER MACKAY,
Counsel for A. T. Jergins Trust.

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MOTION TO STAY ISSUANCE OF MANDATE.

Now comes A. T. Jergins Trust, the Respondent in the above-entitled cause, by its attorneys, and shows to this Court:

Within the time allowed by the rules of this Court said Respondent is filing its petition for a rehearing of this cause and a modification of the judgment of this Court entered herein on March 13, 1933, for the reasons set forth in said petition.

Under Rule 34 of this Court such petition will not operate to stay the mandate of this Court, and such mandate will issue as of course after the expiration of twenty-five days from the day said judgment was entered, unless otherwise ordered.

In view of the nature of said petition for rehearing and the end sought to be accomplished thereby, no useful purpose would be subserved by the issuance of the mandate of this Court prior to the disposition of said petition; but, on the contrary, unnecessary complications and trouble would result.

Wherefore, said Respondent prays that the mandate of this Court be stayed and withheld until said petition for a rehearing shall have been acted upon and disposed of by this Court.

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